United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1474

To be argued by
PAUL E. COFFEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1474

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER SAHADI, JOHN LECONCHE, RICHARD JEAN, VINCENT FERRIGNO, ANDREW LUPO, DONALD QUEALY, ANN TABOR, and DANIEL TEDESCO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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26 U.S.C. § 4401 IMPOSITION OF TAX.

* * * * (a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 2 percent of the amount thereof.

(b) Amount of Wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable For Tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. * * * *

26 U.S.C. § 4403 RECORD REQUIREMENTS.

* * * * Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a). * * * *

26 U.S.C. § 4411 IMPOSITION OF TAX.

* * * * There shall be imposed a special tax of $500 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. * * * *

26 U.S.C. § 4412 REGISTRATION.

* * * * (a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or Company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental Information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. * * * *

26 U.S.C. § 4421 DEFINITIONS.

* * * * For purposes of this chapter—

(1) Wager.—The term "wager" means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.—The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.* * * *

26 U.S.C. § 4422 APPLICABILITY OF FEDERAL AND STATE LAWS.

* * * * The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity,

nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes. * * * *

26 U.S.C. § 4423 INSPECTION OF BOOKS.

* * * * Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. * * * *

26 U.S.C. § 4424 DISCLOSURE OF WAGERING TAX INFORMATION.

* * * * (a) General rule.—Except as otherwise provided in this section, neither the Secretary nor his delegate nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person—

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible disclosure.—A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be—

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of documents possessed by taxpayer.—Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title—

(1) any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be used against such taxpayer in any criminal proceeding.

(d) Inspection by Committees of Congress.—Section 6103(d) shall apply with respect to any return, payment, or registration made pursuant to this chapter. * * * *

26 U.S.C. § 6103 PUBLICITY OF RETURNS AND LISTS OF TAXPAYERS.

* * * * (d) Inspection by committees of Congress.--

(1) Committees on Ways and Means and Finance.—

(A) The Secretary and any officer or employee of the Treasury Department, upon request from

the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

(B) Any such committee shall have the right, acting directly as a committee, or by or through such examiners or agents as it may designate or appoint, to inspect any or all of the returns at such times and in such manner as it may determine.

(C) Any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and the House, as the case may be.

(2) Joint Committee on Internal Revenue Taxation.—The Joint Committee on Internal Revenue Taxation shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House or Representatives, the Committee on Ways and Means, or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be.* * * *

§ 5848. Restrictive use of information

(a) General rule.—No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person

in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information.—Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

§ 6107. List of special taxpayers for public inspection

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged. (Repealed October 22, 1968).

Title 18, United States Code

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1474

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER SAHADI, JOHN LECONCHE, RICHARD JEAN, VINCENT FERRIGNO, ANDREW LUPO, DONALD QUEALY, ANN TABOR, and DANIEL TEDESCO,

Appellants.

BRIEF FOR THE APPELLEE

Statement of the Case

On May 14, 1976 the United States Attorney for the District of Connecticut filed separate criminal informations against eighteen Hartford bookmakers, four of whom were charged with wilful failure to file federal wagering tax returns (in violation of 26 U.S.C. 7203), and fourteen of whom were charged with failing to pay the special occupational wagering tax (26 U.S.C. 7262). To date, sixteen have been convicted after pleas of guilty or nolle contendere, one has been convicted by a jury, and the remaining defendant still awaits trial. In the District Court, the government agreed to allow each appellant in the present consolidated appeal to raise the constitutionality of Chapter 35, Title 26, United States Code. This section of the Code encompasses the federal wagering tax laws as amended by Congress in 1974.

The offense committed by each appellant occurred in 1975. There are no factual issues of guilt, or *ex post facto* questions presented by either side of this appeal. Nor is the legality of any sentence challenged. For purposes of this consolidated appeal, therefore, appellant Daniel Tedesco, in violation of 26 U.S.C. 7203, wilfully failed to comply with any of the wagering tax law requirements under Chapter 35 while having been engaged in the business of bookmaking in Hartford, Connecticut, and appellants Andrew Lupo, John LeConche, Peter Sahadi, Vincent Ferrigno, Don Quealy, Richard Jean, and Ann Tabor, in violation of 26 U.S.C. 7262, each while engaged in the business of accepting wagers, or assisting someone so engaged, in Hartford County, failed to pay the special occupational tax of $500 prior to engaging in such taxable activity.

Issue Presented for Appeal

Does Section 4424 of Title 26, United States Code, Provide Sufficient Disclosure Limitations On The Use Of Wagering Tax Return Information So As To Prevent Compulsory Self-Incrimination In Gambling Prosecutions Subsequent To The Filing Of Said Returns?

DISCUSSION

I.

Prior And Existing Law And Marchetti-Grosso

The legal framework, out of which the present appeal arises may, most conveniently, be broken down into three categories: (a) the special tax law relating to the business of wagering prior to 1968; (b) the decisions of the United States Supreme Court in *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United*

States, 390 U.S. 62 (1968); and (c) the statutory changes enacted by Congress in 1974 to overcome constitutional deficiencies in these laws.

A. The special federal gambling tax laws in effect prior to the *Marchetti-Grosso* decisions in 1968 imposed certain obligations and tax liabilities on bookmakers and their agents. Section 4401, Title 26, United States Code imposed a 10% excise tax on all gross wagers accepted by bookmakers, while Section 4411 imposed an additional $50 special tax on each individual operating or aiding the operation of a bookmaking business.[1] Section 4412 required that individuals liable for the special tax under Section 4411 register each year with the local Internal Revenue Service Office by filing a Form 11-C. Section 6806(c) required that registrants under Section 4411 post the "stamp" (received by the bookmakers in return for complying with Section 4441) conspicuously in their places of business or that they be ready to produce it on demand by Department of Treasury personnel. Section 4403 imposed on the bookmaker certain record keeping requirements and allowed for government inspection thereof. Section 6107 required each regional IRS office to maintain for public inspection a listing of those individuals who had complied with, *e.g.*, Section 4411, and also allowed disclosure of this information to state and local law enforcement authorities.

B. In 1968, the United States Supreme Court decided *Marchetti*, *supra*, and *Grosso*, *supra*. In *Marchetti*, a case arising in Connecticut, the defendant had been

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[1] The statutes used the term "business of accepting wagers" rather than "bookmaking." For purposes of this appeal, and the activity for which the appellants were convicted, the term "bookmaking" will be used, as it is both less cumbersome and yet equally as accurate, to denote "the business of accepting wagers".

convicted of wilful failure to register as required under Section 4412, wilful failure to pay the special occupational tax, and conspiracy to defeat payment of that special tax. In *Grosso*, the defendant was convicted of, among other related offenses, wilful failure to pay the excise tax of 10% imposed by Section 4401. The Supreme Court reversed both convictions.

In *Marchetti*, at p. 44, the Court emphasized that its reasons for reversing the conviction were in no way "intended to limit or diminish the vitality of those cases" which had held that the United States could tax unlawful income producing activity. As if to leave no doubt on this point, the Court later reasserted the government's authority to obtain information necessary to carry out its fiscal and regulatory functions:

> ". . . (O)ther methods, entirely consistent with constitutional limitations, exist by which Congress may obtain such information. . . Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes". *Id.*, at p. 60 (citations omitted).

Nothing, the Court held, shields a taxpayer from the tax wagering laws under a statutory scheme where no *substantial* hazard of self-incrimination existed.

The *Marchetti* Court found that the particular statutory scheme in issue was defective because of a combination of factors. First, individuals required to comply with Sections 4411-4412 were inherently suspected of criminal activity. *Id.*, at pp. 46-47. Second, compliance by the IRS with Section 6107, and the resulting public inspection of information gained by the IRS through Sections 4411-4412, had undoubtedly led prosecutors to other evidence upon which non-tax, gambling convictions were obtained

by other law enforcement agencies. *Id.* Third, the Court found that the IRS was assisting the Department of Justice in the enforcement of gambling laws, thus providing a "significant link in a chain" of prosecution. *Id.*, at p. 48. Because of this combination of factors, the Court found that a bookmaker's payment of the special tax, which could only be accomplished by filing the registration information called for in Form 11-C as well, *Id.*, at p. 43, raised a self-incrimination hazard that was "substantial and real" as opposed to "trifling or imaginary".

In *Grosso*, the Court, while noting that the IRS was not required to post compliance with Section 4401 (the 10% excise tax statute), as it was required under Section 6107 to disclose compliance with Section 4412, also noted that there were no limitations on disclosure either. *Supra* at p. 66. Again, the Court found that the combination of factors (inherently unlawful activity plus potentially unbridled disclosure) raised a substantial hazard of self-incrimination. *Id.*, at p. 68. The appellants herein argue, not surprisingly, that the *Marchetti-Grosso* holdings constitute an absolute bar to enforcement of the federal wagering tax laws, even as amended in 1974, absent the insertion of a formal grant of immunity in the statutory tax scheme at the time of compliance.[2]

C. In 1974, Congress finally enacted legislation directly designed to overcome the *Marchetti-Grosso* decisions which had prevented enforcement of he wagering tax laws for the preceding six years.[3] Section 6806(c)

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[2] The other major thrust of appellants' argument is that the present statutory scheme, as discussed *infra*, fails to remove the substantial hazards of self-incrimination even if formal immunity is not a prerequisite to enforcement of the tax wagering laws.

[3] Congress also increased the special occupational tax from $50 to $500 and decreased the wagering excise tax from 10% to 2%.

was amended to remove the requirement that Section 4412 registrants conspicuously display the occupational stamp on their premises or produce it on demand. Section 3107, which required IRS regional offices to maintain public listings of wagering registrants and to provide certified copies thereof on demand to local law enforcement agencies, had previously been repealed in 1968. In addition, Congress enacted a new Section 4424.[4]

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[4] Section 4424 provides:

"Sec. 4424. Disclosure of wagering tax information.

(a) General Rule.—Except as otherwise provided in this section, neither the Secretary or his delegate, nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person——

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter;

(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or;

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Permissible Disclosure—A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be——

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of Documents Possessed by Taxpayer—Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title——

(1) any stamp denoting payment of the special tax under this chapter,

[Footnote continued on following page]

Of particular importance in Section 4424 are the provisions that forbid any Treasury Department employee or officer from disclosing "in *any manner* whatever to *any* person" any return record or "*information come at by the exploitation of any such return*". Section 4424(a) (emphasis supplied). Permissible disclosure under the new section is restricted to civil or criminal enforcement of any *tax* imposed by Title 26, Section 4424(b). With respect to any records or returns kept by the taxpayer pursuant to Chapter 35, or *any information flowing therefrom*, no such documents information can be used against him in *any* criminal proceeding. Section 4424(c). The intent of Congress in passing Section 4424 is manifest.[5]

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(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be used against such taxpayer in any criminal proceeding.

(d) Inspection by Committees of Congress—Section 6103(d) shall apply with respect to any return, payment, or registration made pursuant to this chapter."

[5] "Consequently, to resolve any remaining doubts which may exist under the rationale of the *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62 (1968) cases, the amendment provides that no Treasury Department official or employee may disclose, except in connection with the administration or enforcement of internal revenue taxes, any document or record supplied by a taxpayer in connection with such taxes, or any information obtained through any such documents, or records. Additionally, the amendment provides that certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding, except in connection with the administration or enforcement of internal revenue taxes.

It is expected that these changes in the law will remove any constitutional problems regarding enforcement of the wagering taxes." Conference Report No. 93-1401, U.S. Code Cong. & Adm. News, 93 Cong., 2d Sess., 1974, Vol. 3, pp. 6232-6233.

Nevertheless, appellants assert that the statute is constitutionally deficient, because it does not provide protection commensurate with the Fifth Amendment privilege against self-incrimination.[6]

II.

Compulsory Self-Incrimination Vis-A-Vis The Wagering Tax Laws.

In *Kastigar* v. *United States*, 406 U.S. 411, the Supreme Court upheld the constitutionality of "use immunity", finding that Section 6002, Title 18, United States Code, adequately provided protection from prosecution based on immunized testimony to the extent required by the Fifth Amendment.[7] The Court stated that the protection afforded by the statute need not be broader than the privilege, *Id.*, at 453. In addition, the Court reemphasized that the Fifth Amendment privilege protects against disclosures that an individual "reasonably believes could be used", directly or indirectly, against him. *Id.*, at 444-445.

In *Mackey* v. *United States*, 401 U.S. 667 (1971), a case in which the Court declined to make the *Marchetti-Grosso* holdings retroactive in a tax trial where the defendant's admissions of wagering income on tax returns was used against him, Mr. Justice Brennan suggested that "immunity" was the remedy for securing forced reporting of information or activity inherently suspect as criminal. *Id.*, at 709. It is clear, however, that the ap-

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[6] See, e.g., the Brief of appellant Ferrigno, at p. 23 et seq.; and Brief of appellant Sahadi, at p. 9 et seq.

[7] Section 6002 prohibits the direct or indirect use of immunized testimony or information in any criminal case against the taxpayer.

pellants herein are incorrect in their belief that Section 4424 is defective because use immunity is not set out as expressly as in Section 6002. Justice Brennan, for example, observed in *Mackey*, at p. 711, n. 11, that the reporting and registration requirements of the federal wagering tax statutes could properly be enforced where the statute both protected the registrants from prosecution under federal gambling statutes and protected them against the use of information contained in the returns in prosecutions under state or federal laws making such activities criminal. In a similar situation the Court in *United States* v. *Freed*, 401 U.S. 601 (1971), upheld the constitutionality of Title 26, United States Code, Section 5812(a), which requires the manufacturer-transferor of a firearm to register and disclose information concerning the sale of the weapon to a transferee. Section 5848(a) forbids the direct or indirect use of such information as evidence against the registrant in a criminal proceeding with respect to a violation of law occurring prior to or concurrent with the filing of the registration.[8] The Court, at pp. 604-605, relied in part on the Solicitor General's representation that no information filed pursuant to Section 5812 was disclosed to any law enforcement authority, except as the fact of *non*registration may be necessary to

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[8] Section 5848 provides:

§ 5848. Restrictive use of information

(a) *General rule.*—No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

an investigation under the Act. The Court, in *Freed*, found that the fear of incrimination was trifling because of the statutory barrier against use of the information in a prosecution for prior or concurrent offenses, and by reason of the unavailability of the registration data, as a matter of administration, to local, state or other federal agencies. *Id.*, at pp. 606-607:

> "Since the state and other federal agencies never see the information, he (the registrant) is left in the same position as if he had not given it but had claimed his privilege in the absence of a . . . grant of immunity. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79". *Id.*, at p. 606.

Justice Brennan, concurring in *Freed*, agreed that the new gun registration laws did not pose any realistic possibility of self-incrimination. He further observed, at pp. 610-611, that the non-use of information, either direct or indirect, provided the "immunity" necessary to satisfy the Fifth Amendment. And, in his concurring opinion in *Marchetti, supra*, at p. 72, Justice Brennan carefully agreed that a statutory scheme which is "general enough to avoid conflict with the privilege, *or which assures the necessary confidentiality* or immunity to overcome the privilege" would pass judicial scrutiny (emphasis added).

The "confidentiality" provided by Congress in Section 4424 is exactly the type of non-disclosure protection suggested in *Marchetti-Grosso-Mackey* and approved in Freed. In fact, in Marchetti, the government requested that the Court uphold both the convictions and the statutes simply by judicially imposing non-disclosure restrictions. The Court called this suggestion "in principal an attractive and apparently practical solution of the difficult problem before us". *Marchetti, supra*, at p. 58. However, the

Court declined to adopt this suggestion not because it would not satisfy the Fifth Amendment, but because such a course of action would preempt what the Court felt was a legislative prerogative. *Id.*, at p. 59. As a result, these requested non-disclosure restrictions were subsequently enacted by Congress in 1974. The *Marchetti-Grosso* Court did, however, note the continuing vitality of *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964), as did the court in *Freed, supra*, at p. 606. This was significant in that *Murphy* v. *Waterfront Comm'n* upheld the compulsion of a witness' testimony under a state immunity procedure which did not provide full constitutional protection against use in another forum, i.e. the federal system. The Court simply concluded that the testimony, once immunized, was protected in any forum. This ruling properly placed the focus of the constitutional question not at the point of disclosure, but at the point of use. *See, Grosso, supra*, at p. 81 (Warren, C. J., dissenting). Since the government must show lack of taint in the use of evidence whenever a claim is made that the source thereof derives from prior immunized or protected disclosure, *Kastigar, supra*, at p. 460, the appellants had and still have adequate protection under Section 4424 from prosecution for gambling prosecutions based on protected disclosures by merely raising that claim in any gambling prosecution initiated after wagering tax returns or information are supplied to the IRS.[9]

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[9] It is interesting, and noteworthy, that in Connecticut no individual, to the government's knowledge, since Section 4424 went into effect on December, 1974 has claimed that a state or local gambling prosecution (of which there have been hundreds, perhaps thousands), or federal gambling prosecution has been based on or used information from a compliance with Sections 4401 or 4411. The Department of Justice, to include the federal prosecutive offices in Connecticut, has no information if anyone has complied with Section 4424 since December, 1974.

Appellants also attack Section 4424 on the grounds that the disclosure limitations are not adequate to prevent certain indirect leaks of information to non-Treasury officials and thus, presumably, to other law enforcement authorities. Thus, the appellants assert:

1. Protected information or returns can be disclosed to the Department of Justice if the inquiry by the Department is tax related; subsequent use of information given in answer to the inquiry is unrestricted;

2. Protected information or returns can be directly disseminated to members of Congress for unrestricted use thereafter;

3. Section 4424 does not provide adequate protection for information supplied by a bookmaker relating to wagering after December 1, 1974.

The fact that appellants make these three claims indicates that they have failed to read Section 4424 in its entirety. After pronouncing a general ban against any disclosure of any kind in subsection (a), Congress then added a caveat which permitted limited disclosure in subsection (b), but *only* for the express purpose of administering civil or criminal enforcement of any tax under Title 26, United States Code. Subsection 4424(b)(2), which forbids use of permissibly disclosed information in a prosecution of any offense prior to December 1, 1974 does not create a loophole for use of such information for gambling offenses after that date. Subsection (b)(2) obviously is directed at preventing the use of wagering tax information in prosecutions of *tax* offenses occurring prior to December 1, 1974 in which a bookmaker's compliance with Chapter 35 might otherwise be used against him. This is because subsection 4424(b) begins with the much broader limitation that any disclosure (without re-

gard to time) can only be used, if at all, to administer the tax laws. This point is further emphasized by subsection (c), which states that documents, returns, registration, "*or information come at by the exploitation of any such document*" [10] shall not be used against such taxpayer *in any criminal proceeding* unrelated to a tax matter.

When appellants assert [11] that Section 4424 does not protect against improper use of protected information supplied to the Department of Justice by the Treasury Department in a tax inquiry, they not only ignore the language of subsection (c)(3), the application of which is not limited to Treasury officials, but they also incorrectly assume that Justice officials somehow secure greater prosecutive and dissemination rights as transferees of the information than those of the Treasury officials, the transferors. Such a statutory construction would surely be at odds with the language of Section 4424 as well as being at odds with the expressed intent of Congress to overcome the objections expressed in *Marchetti-Grosso* (*See*, n. 5, *supra*).

Appellants' concern that permissible disclosures by Treasury employees to Congress might eventually leak incriminating information back to Justice officials not only ignores the provisions of Section 4424(c), but also borders on the frivolous. Even assuming, *arguendo*, that a roundabout Congressional disclosure of a bookmaker's compliance with Chapter 35 can then be permissibly used by Justice in a gambling prosecution where direct disclosure from Treasury officials to Justice for that purpose

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[10] It is difficult to imagine what information, or in what form, a bookmaker could give to the Treasury Department that would not be protected from use in a gambling prosecution by Section 4424(c).

[11] *See*, e.g., Brief of Appellant Sahadi, at p. 34.

is forbidden, it would still be hard to consider, as a real and substantial hazard of incrimination, that a book-maker's registration in Connecticut will somehow come to light because of a Congressional executive committee's request for such registration *and* subsequent report to the full House of Representatives or Senate. *See*, Section 6103, Title 26, United States Code.

We also ask this Court not to lose sight of the fact that the appellants totally failed to file any return or supply any information at all. In *Shapiro* v. *United States*, 335 U.S. 1 (1948), the Supreme Court upheld the general power of Congress to compel an individual to produce records necessary to determine his correct taxable income. In *United States* v. *Sullivan*, 274 U.S. 259 (1927), the Court had earlier held that an unlawful business is subject to the tax laws just as any other business. The *Sullivan* Court further stated that while an individual may have a Fifth Amendment claim to certain aspects of his tax return he is not entitled "to draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law". *Id.*, at p. 264.

The *Marchetti-Grosso* decisions, while recognizing the difference between a business inherently suspected of unlawful activity and one which is presumably legitimate, held that the decisions in Sullivan and Shapiro were unimpaired and intact. *Grosso*, *supra*, at p. 72 (Brennan, J., concurring); *Marchetti*, *supra* at pp. 56-57. In this regard, a recent Supreme Court case, *Garner* v. *United States*, 424 U.S. 648 (1976), sheds some light on the current status of the privilege against compulsory self-incrimination vis-a-vis the federal wagering laws. Garner, the defendant, filed income tax returns for 1965-1967 in which he made admissions of wagering. He was later charged with a conspiracy, under Title 18, United States Code, Sections 371 and 1952, to fix horse races.

The government introduced Garner's tax returns for 1965-1967 to rebut Garner's claim that his relationship with other co-conspirators was an innocent one. The Court reaffirmed the vitality of *Sullivan, supra*, insofar as the latter case held that there is no general privilege to refuse to file a return at all. *Id.*, at p. 650. Garner contended, in part, that under the *Marchetti-Grosso-Mackey* line of cases, he was not required to file returns relating to wagering at all and that he retained his privilege by imposing an objection at trial. The Court held that Garner's filing of his tax returns was voluntary in the constitutional sense, thus defeating his compulsory self-incrimination claim. The Court also distinguished *Marchetti* and *Grosso* because, under the facts then existing in those cases, the refusal to file would itself have been incriminatory given the pervasive criminal regulation of gambling. *Id.*, at p. 658, n. 11.

The Court made it clear in *Garner* that the Fifth Amendment privilege no longer applied where the declarant was protected against the use of compelled information and evidence derived therefrom. "Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution." *Id.*, at p. 653, citing *Murphy* v. *Waterfront Comm'n, supra.* Indeed, until the statutory changes in December, 1974, a gambler could invoke the privilege merely by non-filing. *Id.*, at p. 658. We submit, however, that by restricting the availability of wagering tax information in non-tax prosecutions, Congress has achieved the balance between the competing interests of revenue collection authority, and the constitutional privilege against self-incrimination. The Supreme Court's suggestion in *Marchetti* that Congressional enactment of disclosure limitations would suffice is indicative of the constitutionality of Section 4424, particularly in view of the decision in *Freed, supra. See also, United States* v. *Coleman*, 441 F.2d 1132 (5th Cir. 1971).

Individual appellants raise several additional points. Appellant Quealy [12] argues that Section 4424, in that Treasury disclosure may not be made to "persons", inadequately protects against disclosure to "agencies". Section 4424(a), drafted and designed to prohibit dissemination of information obtained by the government through compliance with the wagering reporting laws, prohibits the Treasury Department from divulging information on wagering tax returns "to any person". "Person" is defined in Section 7701, Title 26, United States Code, as "an individual, a trust, estate, partnership, association, company or corporation". The term "individual" would necessarily encompass government agencies other than the Treasury Department because of the simple truth that individuals make up these agencies. Or, to put it conversely it would seem impossible to divulge wagering tax information to an agency without said information ever coming to the attention of an individual in that agency. Even if possible, unless and until the information does come to some individual's attention it is worthless. To the extent the defendant claims that the term "individual" was meant to exclude government agencies and refers to private persons, there is nothing in the legislative history or in the statute itself which supports this construction.

Finally, appellant LeConche [13] complains that his compliance with Section 4424 would, under *Garner*, *supra*, constitute a waiver of further Fifth Amendment privilege should the IRS seek additional information or records in

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[12] Brief of Appellant Quealy, at p. 8.

[13] Brief of Appellant LeConche, at pp. 6-7.

a tax investigation of him. As noted, however, in *Sullivan, supra*, and *Shapiro, supra*, Congress has the right to require business records of income producing activity, even if the activity is unlawful. The evil condemned in *Marchetti-Grosso* was *not* that records of illegal gambling were being required, but that these records were being disseminated for non-tax prosecutions and, because of the nature of gambling and the requirements of mandatory dissemination, such disclosure was almost certain to result in gambling prosecutions. Sections 4401 and 4411 apply only to persons engaged or assisting in the *business* of wagering. So long as compliance records or information under those Sections cannot be disseminated outside Treasury or used for non-tax purposes, such records or information are no more incriminatory than the records of other forms of income producing businesses required in regular tax returns, and there would be no more prohibition against using inaccurate or incomplete wagering tax returns in a tax prosecution than there is in using a false or incomplete Form 1040 in a tax evasion case. *See, Mengarelli* v. *United States*, 426 F.2d 985 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *reh. denied*, 400 U.S. 1002 (1971). Since the tax laws are unconcerned with whether a business arrived at its income legitimately, a bookmaker cannot use his activity as a tax shield where compliance with the tax laws no longer can be used against him in non-tax prosecutions. Section 4424(b)(c).

CONCLUSION

The protection afforded to the appellants under Section 4424, Title 26, United States Code was co-extensive with their privilege against compulsory self-incrimination. Therefore, non-compliance with the registration and filing provisions of Chapter 35 of that Title constituted an offense to which there is no constitutional defense. The convictions should be affirmed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1474

U S A,

APPELLEE,

v.

SAHADI, ET AL,

APPELLANTS.

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 20th day of January, 1977, deponent served the within Brief for the Appellee upon Hubert J. Santos, Esq., 51 Russ Street, Hartford, CT 06106, Charlotte Anne Perretta, Attorney, 15 Congress Street, Boston, MA 02109, Richard S. Cramer, Esq., 450 Main Street, Hartford, CT 06103, Thomas D. Clifford, Esq., 799 Main Street, Hartford, CT. 06103, Michael Graham, Esq., Suite 2, 487 Main Street, Hartford, CT 06103, Mark S. Steier, Esq., 20 N. Main Street, West Hartford, CT, Donald M. Cardwell, Esq. 108 Oak Street, Hartford, CT 06106, and Samuel V. Faulise, Esq., 139 Albany Ave., Hartford, CT 06103.

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 20th day of January, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977